

NO. 47671-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL RUBEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 14-1-04854-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it sentenced defendant to a standard range sentence instead of the requested DOSA when the record shows the court considered factors specific to defendant during sentencing and made a finding that defendant was not appropriate for a DOSA?

B. STATEMENT OF THE CASE.

On December 5, 2014, the Pierce County Prosecutor's office (State) charged MICHAEL GARITHY RUBEY (defendant) with two counts of unlawful possession of a firearm in the second degree. CP 1-2. On May 13, 2015, the State amended the information to add one count of obstructing a law enforcement officer. CP 4-5. Following trial, a jury returned guilty verdicts for all three counts as charged. CP 34-36.

Defendant requested a Drug Offender Sentencing Alternative (DOSA). 3RP 422. The trial court denied the request and immediately thereafter, referenced defendant's three prior felony firearm possession charges. 3RP 422-23. The court subsequently determined defendant would be required to register as a felony firearm offender based on his criminal history and "potential danger to the community." 3RP 425. The State clarified with the trial court that defendant was technically eligible for a DOSA, and requested the court enter a finding exercising its discretion

that defendant was not appropriate to receive one. 3RP 428. The court stated it would make that finding. 3RP 428.

Defendant was sentenced to a standard range sentence on May 29, 2015. CP 40-55, 56-60. He filed a timely notice of appeal. CP 61-62.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING DEFENDANT WAS NOT APPROPRIATE FOR A DOSA WHEN THE RECORD SHOWS THE COURT CONSIDERED FACTORS SPECIFIC TO DEFENDANT DURING SENTENCING AND MADE A FINDING THAT DEFENDANT WAS NOT APPROPRIATE FOR A DOSA.

A trial court's decision to impose a standard-range sentence instead of a DOSA is not reviewable as a general rule. *State v. Jones*, 171 Wn. App. 52, 55, 286 P.3d 83 (2012) (citing *State v. Grayson*, 154 Wn.2d 333, 338, 111, P.3d 1183 (2005)). A defendant may challenge only the procedure by which the sentence was imposed. *Grayson*, 154 Wn.2d at 338. A challenge to a DOSA denial is reviewed for an abuse of discretion. *Id.* at 342. "A trial court abuses discretion when 'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.'" *Id.* A trial court has considerable and "largely unfettered" discretion as to whether a sentencing alternative is appropriate. See *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993); see also *State v.*

Herzog, 112 Wn.2d 419, 423-25, 771 P.2d 739 (1989); *see also State v. Hender*, 180 Wn. App. 895, 900-01, 324 P.3d 780 (2014).

Although defendants are entitled to ask the trial court to consider a DOSA, defendants are not entitled to receive one. *Grayson*, 154 Wn.2d at 342. Being eligible to receive a DOSA does not automatically result in a DOSA sentence. *Hender*, 180 Wn. App. at 900. A trial court may rely on facts admitted, proved, or acknowledged to determine whether to sentence a defendant to a DOSA. *Grayson*, 154 Wn.2d at 339.

Our state supreme court held a trial court abuses its discretion when it categorically denies a DOSA. *Id.* at 342. In *Grayson*, the trial court denied the defendant's request for a DOSA on the basis that the program was underfunded, a factor not relating to the defendant in any way. *Id.* In that case, the trial court gave no indication that it would have found the defendant inappropriate. *Id.*

Where the record indicates the trial court considered factors in deciding whether to deny or grant a DOSA, the denial is not categorical and thus not an abuse of discretion. *Jones*, 171 Wn. App. at 55-56 (holding denial of DOSA was not an abuse of discretion when the record showed the trial court considered the defendant's criminal history, whether defendant would benefit from treatment, and whether a DOSA would serve the community).

Although the trial court interpreted RCW 9.94A.660 to preclude a DOSA sentence when the violation involves a firearm, not just a firearm

enhancement as stated in the statute¹, when pressed, the trial court indicated it would not have granted one to this defendant regardless. 3RP 422, 428. The trial court explained its understanding that firearm enhancements indicated a legislative intent that violations involving firearms or deadly weapons should preclude a DOSA. 3RP 428. After having just balanced the factors to determine defendant would be required to register as a felony firearm offender, the trial court made a finding that defendant was not appropriate for a DOSA. The DOSA statute explicitly gives a trial court discretion to determine if “the alternative sentence is appropriate.” RCW 9.94A.660(3). Here, the court determined that this defendant with his history of felony firearm possessions, was not appropriate for a DOSA.

The trial court in this case carefully considered factors specific to defendant in making its sentencing decisions. Factors articulated by the trial court at sentencing include: (1) the fact that defendant was on community custody at the time of the current offense, (2) defendant’s criminal history, which includes three prior convictions for unlawful possession of a firearm, and (3) the potential danger defendant poses to the community. 3RP 423-25; CP 37-39. The trial court expressed concern over defendant’s ability to follow court orders. 3RP 424. The trial court

¹ “(1) An offender is eligible for the special drug offender sentencing alternative if: (a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4).” RCW 9.94A.660(1)(a).

necessarily relied on these factors in considering defendant's request for a DOSA.

The trial court also considered whether defendant would benefit from treatment when it informed defendant there are programs at the Department of Corrections that defendant could take advantage of, if he had a drug addiction and was serious about doing something about it. 3RP 422.

A lack of accountability on the part of the defendant has been held to be sufficient to deny a DOSA. *Hender*, 180 Wn. App. at 902 (holding trial court did not abuse its discretion in denying a DOSA based on the defendant's lack of accountability and refusal to be responsible for his conduct). Here, defendant stated to the trial court when requesting a DOSA, "every time that I did have a felony possession of a firearm, they was [sic] never mine." 3RP 421. Defendant's lack of responsibility did not go unnoted by the trial court. 3RP 422.

The trial court did not categorically deny a DOSA under any circumstances; rather, it exercised its discretion in finding that this particular defendant was not appropriate to receive a DOSA. While the trial court's initial reading of RCW 9.94A.660(1)(a) was erroneous, any error was cured because the trial court explicitly stated that it would not grant this defendant a DOSA regardless. Based on this finding, there is no need for a new sentencing in this case.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant's sentence.

DATED: March 10, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/10/16 
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PIERCE COUNTY PROSECUTOR

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